(1)
Supreme Court, U.S.
FILED
991044 DEC 15 1999
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

LARRY JONES,

Petitioner,

v.

JAMES J. CERVANTES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Does a law enforcement officer lose his absolute immunity as a testifying witness merely by participating in a criminal investigation where a plaintiff claims the officer fabricated evidence and testified falsely and contends the officer is a "complaining witness"?

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CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI

Petitioner Larry Jones respectfully requests this Court to grant this conditional cross-petition for a writ of certiorari and to review the Seventh Circuit's decision if this Court grants respondent's petition.

OPINIONS BELOW

The Seventh Circuit's decision is reprinted in the respondent's appendix and is reported at 188 F.3d 805.[1] The district court's decision granting summary judgment is reprinted in the respondent's appendix at A18-30 and is reported at 23 F.Supp.2d 885.

JURISDICTIONAL STATEMENT

The Seventh Circuit entered its decision on August 13, 1999. No rehearing was sought. The respondent timely filed his petition for a writ of certiorari on November 12, 1999, which was docketed in this Court on November 15, 1999. Pursuant to Rule 12.5, this conditional cross petition is timely filed within 30 days of the docketing of respondent's petition. This Court has jurisdiction under 28 U.S.C. §1254(1).

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[1] The decision in respondent's appendix ("Resp.App.") is inaccurately reproduced because the text of two footnotes are included in the main text. The Seventh Circuit's decision is correctly reproduced in petitioner's appendix to the brief in opposition ("App.").

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Unites States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1983 (42 U.S.C. §1983) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Respondent filed this action under 42 U.S.C. §1983 after he was found not guilty of the murder of Sally Lavergne, alleging that petitioner, one of several law enforcement officers from various agencies who participated in the murder investigation, fabricated evidence and testified falsely. In the district court, the only evidence which the respondent claimed was fabricated was

a statement made by respondent (App. A26-28; Dkt.12, Exh.2; Dkt.19, pp.2, 11-12; Dkt.20, Exh.7).

Petitioner testified before the grand jury that at 5:00 a.m. as he drove respondent home, he told respondent that it seemed like he "would like to admit what you've done, get it out of the way, get the punishment that you deserve for doing it and get started with the rest of your life" (Resp. App. 50-51). He testified that respondent stated: "[Y]es, I would like to do that," but "if" he admitted to the killing, "what would my defense be?" (Resp. App. 50-51). Respondent's version of this conversation is: "I told him if I confess to a crime that I did not commit, what would be my defense? I got too much to lose" (Dkt.12, Exh.4, Tr. 74-75).

John Barsanti, the assistant state's attorney who prosecuted respondent, testified that he did not rely on petitioner's report of this conversation in deciding to seek an indictment because he thought it was equivocal (App. A28). Barsanti then independently reviewed the information developed thus far in the investigation when petitioner went to Barsanti to ask him to seek a warrant for hair and blood samples from respondent (App. A16-17). Barsanti testified that he decided not to seek a warrant for further evidence because he unilaterally decided that there was sufficient evidence to take the case to the grand jury (App. A16-17). Barsanti testified that petitioner did not request, pressure, urge or attempt to influence him in this decision (App. A17, A31).

No less than five law enforcement agencies were involved in some aspect of the investigation, including the FBI, the Illinois State Police, and the police departments of St. Charles, West Dundee and South Elgin (of which

petitioner was a member) (Dkt.12, Exh.1; App. A17-18, A23-24). Multiple officers, including petitioner, were involved in the investigation and in interviewing the various witnesses (App. A17-27).

Only petitioner was subpoenaed and testified before the grand jury. Only petitioner was sued by respondent. The prosecutor explained that he decided to subpoena petitioner because he was familiar with all aspects of the investigation, but he could have just as easily subpoenaed any one of the law enforcement officers from the various agencies involved (App. A28-29).

The district court held that there was no genuine issue of material fact and that the petitioner was not a complaining witness because he did not initiate or instigate the prosecution (Resp.App. 26). The Seventh Circuit did not address the complaining witness issue, but affirmed on the alternate ground that respondent had not shown there was a lack of probable cause, which was an essential element of his case (App. A7-8).

SUMMARY OF THE ARGUMENT

Under this Court's established precedent, a "functional approach" is utilized to determine whether a state actor is immune. Where a person's function is to testify in a judicial proceeding, that person is absolutely immune. Some circuits have held that where a plaintiff alleges that a law enforcement officer fabricated evidence and testified falsely to that evidence, the officer loses his immunity because he is a complaining witness. The so-called "complaining witness exception" is inconsistent with this Court's precedent that the type of immunity

which attaches depends on a person's function at the time of the alleged wrongful act, and is not eviscerated simply because that person performs another function at some other point in time. This Court should accept this case for review to resolve the conflict in the circuits and decide this important issue.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD RESOLVE THE CONFLICT ON WHETHER THERE IS A "COMPLAINING WITNESS EXCEPTION" WHICH DEPRIVES A TESTIFYING WITNESS OF ABSOLUTE IMMUNITY

This Court utilizes a "functional approach," in which a court looks to "the nature of the function performed, not the identity of the actor who performed it" to determine if there is immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)). *See generally Burns v. Reed*, 500 U.S. 478, 486 (1991) (collecting cases). Under this "functional approach," a defendant's function or role in a judicial proceeding determines his immunity.

In this case, besides being one of the investigators, petitioner also testified in front of the grand jury after the prosecutor decided to subpoena only him, one of several officers involved in the investigation. Under *Briscoe v. LaHue*, 460 U.S. 325 (1983), petitioner is absolutely immune even if his testimony were false or he committed perjury. This Court has "interpreted §1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process, . . . because any lesser degree of immunity could impair the judicial

process itself." *Malley v. Briggs*, 475 U.S. 335, 342-43 (1986) (citing *Briscoe*, 460 U.S. at 334-35).

A. The Record Shows Petitioner Was Not a Complaining Witness.

That this petitioner, as part of his official duties, participated in an investigation with five other law enforcement agencies does not make him the "complaining witness." The term "complaining witness" is a misnomer because that person is not necessarily a witness, but is the person who initiates or instigates a criminal prosecution (App. 7). *Kalina v. Fletcher*, 522 U.S. 118, 135 (1997) (Scalia, J., concurring). At common law, the complaining witness was the person who was victimized and who lodged a complaint with the authorities, commencing a criminal prosecution. *See, e.g., People v. Bernor,* 115 Mich. 692, 74 N.W. 184 (1898); *Schultz v. Huebner,* 108 Mich. 274, 66 N.W. 57 (1896) (drawing distinction between role played by complaining witness and police); *Cudahy v. Powell,* 35 Ill.App. 29 (1889).

A complaining witness was not subject to a malicious prosecution suit unless he acted with malice and in the absence of probable cause. *Kalina*, 522 U.S. at 127; *Malley*, 475 U.S. at 340-41. If there was probable cause, then the defendant's motive or malice was immaterial. *Wagner v. Aultman*, 2 Ill.App. 147, 150 (1878). Here, there was probable cause (as shown in petitioner's brief in opposition to respondent's petition), and thus petitioner could not be sued as a complaining witness, even if he had a bad motive or malice. *Id.*

This record shows that the petitioner was not pressuring the prosecutor to seek an indictment. Rather, he wanted to continue the investigation. It was the prosecutor who decided not to seek a warrant for more physical evidence, but to take the information already developed during the investigation by five law enforcement agencies to the grand jury. True, petitioner also was a testifying witness before the grand jury. But he was subpoenaed, and this record shows that he was one of multiple law enforcement officers who could have been subpoenaed to testify about the investigation according to the prosecutor (App. A28-29). The prosecutor did not decide to subpoena petitioner because he was the only one with information and who was instigating the prosecution. Rather, he selected the petitioner because he was the most familiar with all aspects of the investigation (App. A28). Because the decision to seek an indictment was the prosecutor's alone, the petitioner did not instigate the proceeding and was not a complaining witness. *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988) (citing RESTATEMENT (SECOND) OF TORTS, §653 comment g (1977). *See also* W. Prosser, LAW OF TORTS, §119 (4th ed. 1971).

If the petitioner were held to be a complaining witness under these circumstances, then all law enforcement officers would be subject to a civil rights suit whenever a person is indicted, but not convicted, and the law enforcement officers both investigated the crime and testified at a judicial proceeding. This would mean that an officer would face personal liability whenever an accused is acquitted and accuses the officer of fabricating evidence and testifying falsely. All a plaintiff need do is affix the label of "complaining witness" to the officer, and the race for §1983 damages would begin.

B. There Is a Conflict in the Circuits on the "Complaining Witness Exception."

The Seventh Circuit did not decide this case based on the "complaining witness exception," stating it was a "close" question whether petitioner was a complaining witness (App. A7-8). The district court granted summary judgment on the basis that petitioner was not a complaining witness (Resp.App. A18-30).

As noted above, petitioner disputes that he was a complaining witness (who can be liable only if he acted with malice and without probable cause). However, if this Court takes this case and determines that an investigating officer under these circumstances is a complaining witness, the question then presented is whether that person loses absolute immunity for his testimony? Petitioner submits there is no such exception to the absolute immunity accorded to testifying witnesses, and even if they were complaining witnesses, they do not lose absolute immunity as testifying witnesses.

The Eleventh Circuit in *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999) declined to find an exception to a testifying witness' absolute immunity under this Court's functional approach. 174 F.3d. at 1282. Where the false statements were "the sole basis asserted for probable cause in the arrest affidavit," there was no immunity from liability arising from that action. *Jones,* 174 F.3d at 1285. However, where that officer also testified before a grand jury, at the criminal trial and during pre-trial depositions, even if false, he is absolutely immune. *Id.* at 1286. The "complaining witness exception" also has not been accepted by the Third Circuit. *Kulwicki v. Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992).

Three circuits have held that if a testifying witness is also a complaining witness, this deprives him of absolute immunity when he testifies. The Second Circuit has recognized such an exception. In *White v. Frank*, 855 F.2d 956 (2d Cir. 1988), two police officers were convicted of criminal official misconduct. One officer admitted he committed perjury in front of a grand jury and at trial, resulting in the plaintiff's conviction. Plaintiff then sued the officers under 42 U.S.C. §1983. The Second Circuit held that because the officers had initiated a baseless prosecution, they were subject to suit. *Id.* at 959-60 (citing *Malley*, 475 U.S. at 340). *White* holds that if a person is involved in the initiation of a suit, then he is subject to liability for all further actions in those proceedings, regardless of his other functions. *White* cannot be reconciled with the holding in *Briscoe* that testifying witnesses are absolutely immune, even if they commit perjury, and the sole recourse is criminal charges. 855 F.2d at 961.

The Ninth and Tenth Circuits have also recognized the "complaining witness exception." *Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir. 1997); *Anthony v. Baker,* 955 F.2d, 395, 1401 (10th Cir. 1992). The Seventh Circuit has discussed this exception without applying it in this and other decisions (App. A6-8). *See, e.g., Curtis v. Bembenek*, 48 F.3d 281, 285-86 (7th Cir. 1995) (holding that where a malicious prosecution claim was not stated, plaintiff could not rely on a "complaining witness theory").

Recognition of such an exception eviscerates the absolute immunity of a testifying witness and cannot be reconciled with this Court's functional approach and precedent. In two cases, this Court has looked at the

function of the defendant to determine his immunity and accorded different immunity depending on each function. If a person has two roles, then it decides the applicable immunity based on each role. *Kalina*, 522 U.S. at 129-30 (holding that the prosecutor was absolutely immune for actions taken "in connection with the preparation and filing of the two charging documents—the information and the motion for an arrest warrant," but not absolutely immune when signing an affidavit in support of the application for an arrest warrant which contained false statements because this is not the role of a prosecuting attorney); *Burns*, 500 U.S. at 487 (holding that a prosecutor is absolutely immune for appearing at a probable cause hearing as the lawyer for the State, but not absolutely immune for giving legal advice to the police because it is not so "intimately associated with the judicial phase of the criminal process," citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

The question of whether there is a "complaining witness exception" to a testifying witness' absolute immunity is one on which the circuits conflict and which, if applied, conflicts with this Court's functional analysis. Merely labeling a police officer a "complaining witness" is insufficient to vitiate the absolute protection accorded to testifying witnesses. The function of initiating a prosecution and testifying in a judicial proceeding are separate and distinct functions. Those circuits which have applied the "complaining witness exception" ignore this and merge the two concepts. This Court should accept review, resolve this conflict, and decide this important question.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 15, 1999